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9
10 UNITED STATES DISTRICT COURT

11 DISTRICT OF NEVADA

12 RYAN BUNDY, *et al.*,

Case No. 2:23-cv-01724-RFB-VCF

13 Plaintiffs,

**THE UNITED STATES OF AMERICA'S REPLY
IN SUPPORT OF MOTION TO DISMISS THE
SECOND AMENDED COMPLAINT**

14 v.

15 UNITED STATES OF AMERICA, *et al.*,

16 Defendants.

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1 **I. Introduction**

2 Plaintiffs seek to create subject matter jurisdiction over this lawsuit by filing a second amended
 3 complaint (ECF No. 38, “SAC”) that does nothing more than *delete* prior allegations in Plaintiffs’
 4 pleadings—specifically, the SAC removes 47 distinct allegations from the first amended complaint (ECF
 5 No. 11, “FAC”) regarding federal prosecutorial direction, guidance, and control of law enforcement
 6 conduct by specifically named federal prosecutors. *See* ECF No. 39-1 (“Exhibit A”). But as the United
 7 States established in its motion to dismiss, Plaintiffs cannot create subject matter jurisdiction in this
 8 manner because amendment of jurisdictional facts must be limited to *additional* allegations that do not
 9 contradict the prior allegations. ECF No. 39 (“Mot.”) at 8-11. Plaintiffs’ Opposition (ECF No. 44,
 10 “Opp.”) agrees that the SAC must allege additional facts to establish jurisdiction, but the SAC nevertheless
 11 fails to allege *any* new facts—much less facts that are not contradicted by the 47 instances of federal
 12 prosecutorial control alleged in the FAC—that could establish federal jurisdiction. Plaintiffs’ lawsuit is
 13 thus subject to dismissal, with prejudice, under Federal Rule of Civil Procedure 12(b)(1).

14 But in addition to failing to establish subject matter jurisdiction, Plaintiffs’ Opposition does not
 15 respond substantively to any of the pleading deficiencies identified in the United States’ Motion. With
 16 respect to the malicious prosecution claim, the Opposition (1) does not point to *any* factual allegation in
 17 the SAC that could overcome the legal presumption that federal prosecutors exercised independent
 18 judgment when they decided to initiate criminal proceedings against Ryan Bundy and Ryan Payne;
 19 (2) relies on an incorrect legal standard for the favorable termination element of a malicious prosecution
 20 claim under Nevada state law, and (3) fails to identify *any* factual allegation in the SAC to overcome the
 21 presumption that Bundy’s and Payne’s prosecutions were supported by probable cause. The Opposition
 22 also impermissibly tries to refocus the intentional infliction of emotional distress (“IIED”) claim from the
 23 post-indictment conduct alleged in the SAC—which either is barred by sovereign immunity or fails to
 24 establish “extreme and outrageous” behavior as a matter of law—to pre-indictment conduct, but any such
 25 IIED claim would be “forever barred” by the two-year statute of limitations in 28 U.S.C. § 2401(b). And
 26 the derivative loss of consortium claim cannot survive because none of Plaintiffs’ other claims can survive.
 27 Finally, the Opposition does not even address the United States’ argument that the SAC’s constitutional
 28 and statutory violation allegations are not cognizable in this Federal Tort Claims Act (“FTCA”) action.

1 The SAC is the third complaint that Plaintiffs have filed in this lawsuit, but it still fails to establish
 2 subject matter jurisdiction, and every cause of action alleged therein continues to be deficiently pleaded.
 3 As a result, Plaintiffs' lawsuit should be dismissed, with prejudice.

4 **II. The SAC Fails To Allege Additional Facts Regarding Independent Conduct By Law
 Enforcement Officers And Thus Does Not Establish Subject Matter Jurisdiction**

6 As the United States demonstrated in both its first motion to dismiss and the instant Motion, the
 7 FAC's 47 paragraphs of allegations regarding federal prosecutorial control over all relevant law
 8 enforcement conduct are fundamentally incompatible with the United States' sovereign immunity and
 9 thus negated subject matter jurisdiction over this lawsuit. Mot. at 9-10. The Opposition contends that
 10 Plaintiffs "should be permitted to plead additional facts that could cure the Complaint's deficiencies[.]"
 11 Opp. at 5 (quoting *United States ex rel. Lee v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011)).
 12 But the SAC fails to meet Plaintiffs' own suggested burden; it does not allege *any* "additional facts" or
 13 *any* additional events—beyond events that Plaintiffs already conceded (47 times) were directed, guided,
 14 and controlled by federal prosecutors—to plausibly suggest law enforcement officers acted independently
 15 of federal prosecutors. Mot. at 10-11. Indeed, the Opposition acknowledges that the "*only* difference
 16 [between the FAC and the SAC] is that Plaintiffs have no longer included the Department of Justice or
 17 the U.S. Attorney's employees and their actions in the allegations[.]" Opp. at 5 (emphasis added).

18 However, Plaintiffs' amendments must be consistent with the allegations in the FAC, and doing
 19 nothing more than deleting jurisdiction-defeating facts that appear in 47 different paragraphs in the FAC
 20 does not fulfill Plaintiffs' burden to plead "additional allegations that are consistent with the challenged
 21 pleading and that do not contradict the allegations in the original complaint." *Corinthian Colleges*, 655
 22 F.3d at 995; *see also* *Airs Aromatics, LLC v. Victoria's Secret Stores Brand Mgmt.*, 744 F.3d 595, 600
 23 (9th Cir. 2014); Mot. at 10-11. And to the extent Plaintiffs contend that, solely by removing allegations
 24 regarding federal prosecutorial control over the events at issue in both the FAC and SAC, Plaintiffs thereby
 25 establish independent law enforcement conduct in the SAC (Opp. at 5), Plaintiffs ignore that any such
 26 conclusion contradicts the FAC's 47 paragraphs expressly alleging that federal prosecutors directed,
 27 guided, and controlled each of these events. A contradictory and inconsistent amendment like Plaintiffs'
 28 is not permissible. *Corinthian Colleges*, 655 F.3d at 995; *Airs Aromatics, LLC*, 744 F.3d at 600.

1 Plaintiffs further contend that the Court may look only to the SAC—and should ignore the FAC—
 2 to determine whether it has jurisdiction over this lawsuit. Opp. at 5. But Plaintiffs' suggested selective
 3 assessment of the docket would be inappropriate where, as here, a plaintiff files an amended complaint
 4 that seeks to contradict the jurisdictional underpinnings of the lawsuit. Simply stated, the Court cannot
 5 assess whether the jurisdictional allegations in the SAC and FAC are consistent without considering the
 6 jurisdiction-negating allegations in the FAC. *See supra*.

7 Moreover, neither of the cases Plaintiffs cite for their argument that the Court's jurisdictional
 8 analysis is limited to the SAC applies to the procedural posture of this case. Plaintiffs first cite *Rockwell*
 9 *Int'l Corp. v. United States*, 549 U.S. 457 (2007), for the proposition that "courts look to the amended
 10 complaint to determine jurisdiction." Opp. at 5. But the Ninth Circuit has already rejected the
 11 interpretation of *Rockwell* that Plaintiffs advance here, finding *Rockwell* "inapposite" where a plaintiff
 12 amends a complaint to create federal question jurisdiction. *Strudley v. Santa Cruz Cty. Bank*, 747 F. App'x
 13 617, 618 (9th Cir. 2019) (*Rockwell* "is inapposite because [it] stands for the proposition that a plaintiff
 14 may voluntarily amend its original complaint to *remove* federal jurisdiction. . . . Plaintiffs amended their
 15 complaint for the exact opposite purpose in this case") (emphasis in original). *Rockwell* thus provides no
 16 support for Plaintiffs' effort to create (rather than remove) federal jurisdiction by filing the SAC.

17 The First Circuit's non-precedential decision in *Connectu LLC v. Zuckerberg*, is also inapposite
 18 because the amended complaint in that case added a new claim that established an independent basis for
 19 subject matter jurisdiction. 522 F.3d 82, 93 (1st Cir. 2008) (plaintiff "amended its complaint in response
 20 to its copyright registration and altered the jurisdictional foundation of its action"). In this case, in contrast,
 21 the SAC does not add any new claims, and it relies on the exact same jurisdictional foundation as the
 22 FAC, *i.e.*, the FTCA. *Compare* FAC ¶ 1 with SAC ¶ 1. But the FAC's allegations—repeated 47 times—
 23 that federal prosecutors directed, guided, and controlled every act that led to Bundy's and Payne's
 24 prosecution negated this Court's subject matter jurisdiction, and Plaintiffs cannot simply delete those
 25 allegations and pretend they never existed. *Connectu* is further distinguished because, in that case, an
 26 "amended complaint was filed *as of right* and became the operative complaint without judicial
 27 intervention and before any jurisdictional challenge had surfaced." *Connectu*, 522 F.3d at 95-96
 28 (emphasis in original). Here, Plaintiffs did not file the SAC "as of right"; they instead filed that pleading

1 in response to this Court’s order granting the United States’ motion to dismiss the FAC, which expressly
 2 challenged subject matter jurisdiction. *See* ECF Nos. 12 & 37.

3 Although not raised by Plaintiffs in the Opposition, the First Circuit observed in *Connectu* that
 4 “courts have been careful not to import the time-of-filing rule indiscriminately into the federal question
 5 realm.” *Connectu*, 522 F.3d at 92. But the Ninth Circuit *has* applied the time-of-filing rule to the federal
 6 question jurisdictional analysis and refused to accept an attempt “to create jurisdiction, not clarify it, when
 7 they amended their complaint to add a federal cause of action.” *Strudley*, 747 F. App’x at 618. Here, the
 8 SAC does not “clarify” jurisdiction; instead, it seeks to “create” jurisdiction where it did not previously
 9 exist solely by deleting 47 paragraphs of jurisdiction-defeating allegations in the FAC. Plaintiffs cannot
 10 create federal question jurisdiction in this manner. *Id.*; *Corinthian Colleges*, 655 F.3d at 995.

11 **III. The SAC Does Not State A Claim Upon Which Relief Can Be Granted**

12 **A. The Opposition Fails To Rebut Any Of The Three Independent Pleading
 13 Deficiencies In The SAC’s Malicious Prosecution Claim**

14 To survive this Rule 12(b)(6) challenge to the malicious prosecution claim, Plaintiffs must point
 15 to plausible factual allegations in the SAC that (1) overcome the presumption of independent prosecutorial
 16 judgment, (2) establish a legally cognizable favorable outcome of the underlying criminal proceeding, and
 17 (3) demonstrate a lack of probable cause for Bundy’s and Payne’s prosecution. *See* Mot. at 11-19. Despite
 18 the fact that the SAC is the third complaint that Plaintiffs have filed in this lawsuit, the Opposition does
 19 not point to allegations in the SAC that overcome *any* of these three independent bases for dismissal.

20 **1. The SAC Does Not Allege Any Facts To Overcome The Presumption Of
 21 Independent Prosecutorial Judgment**

22 To plead a valid malicious prosecution claim, Plaintiffs must allege facts that rebut the
 23 presumption that federal prosecutors exercised independent judgment when they initiated criminal charges
 24 against Bundy and Payne. Mot. at 12-13; *Jones v. Keitz*, 738 F. App’x 503 (9th Cir. 2018) (affirming
 25 Rule 12(b)(6) dismissal where the complaint failed to allege facts to rebut the presumption of independent
 26 prosecutorial judgment); *Crain v. Nevada*, 724 F. App’x 591, 592 (9th Cir. 2018) (same). The Opposition
 27 contends that “nothing suggests that [law enforcement officers] were coerced, in any way, to engage in
 28 wrongful behavior by any prosecutor” (Opp. at 10), but the relevant test is not whether law enforcement

1 officers “were coerced” by prosecutors, but rather whether the SAC alleges facts plausibly suggesting that
 2 law enforcement officers coerced, duped, or otherwise exerted improper influence *on federal prosecutors*
 3 to cause the prosecutors to initiate Bundy’s and Payne’s criminal proceedings. *Awabdy v. City of*
 4 *Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004) (malicious prosecution claims are cognizable only where
 5 law enforcement officers “improperly exerted pressure on the prosecutor, knowingly provided
 6 misinformation to him, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith
 7 conduct that was actively instrumental in causing the initiation of legal proceedings”).

8 Regardless of Plaintiffs’ incorrect legal standard, and putting aside the FAC’s *many* allegations of
 9 federal prosecutorial control over all relevant law enforcement conduct (which negate any inference that
 10 federal prosecutors failed to exercise independent judgment), neither the SAC nor the Opposition includes
 11 factual allegations that even approach Plaintiffs’ burden to overcome the presumption of independent
 12 prosecutorial judgment. Instead, the examples discussed in the Opposition are unconnected to the legal
 13 charges in Ryan Bundy’s and Ryan Payne’s indictment, and they are unaccompanied by factual allegations
 14 in the SAC to rebut the presumption of independent prosecutorial judgment. For example:

15 • Plaintiffs claim that the BLM maintained a “kill list” and the FBI had an “Arrest Tracking
 16 Wall” during the standoff (Opp. at 9-10 (citing SAC ¶ 23)), but the SAC does not allege any facts
 17 suggesting that either the kill list or the arrest tracking wall (neither of which appears to be independently
 18 tortious) was ever presented to federal prosecutors, much less that those items were “actively instrumental
 19 in causing the initiation of legal proceedings” against Bundy or Payne. *Awabdy*, 368 F.3d at 1067.

20 • Plaintiffs assert that law enforcement officers fabricated evidence regarding a surveillance
 21 camera (Opp. at 10), but the SAC nowhere alleges facts suggesting that fabricated surveillance footage
 22 had any role in the initiation of legal proceedings against Bundy and Payne. Instead, the SAC alleges that
 23 this evidence was not even at issue in the criminal proceedings until August 2017, more than a year *after*
 24 federal prosecutors obtained the superseding indictment for Bundy and Payne. SAC ¶ 34; *Smiddy v.*
 25 *Varney*, 665 F.2d 261, 266 (9th Cir. 1981) (post-indictment acts are irrelevant to malicious prosecution).

26 • Plaintiffs further argue that Agent Willis “falsely informed the Grand Jury that in 2014, the
 27 Bundy Defendants were snipers when, in fact, the snipers were deployed by the BLM and/or FBI.” Opp.
 28 at 10 (citing SAC ¶ 36). But the SAC does not allege any facts to rebut the legal presumption that federal

1 prosecutors exercised their independent prosecutorial judgment when this evidence was purportedly
 2 presented to the grand jury. Nor could Plaintiffs make such an allegation without contradicting the
 3 allegations in the FAC, which expressly alleged that Agent Willis's testimony "was performed at the
 4 direction of AUSAs Ahmed, Myhre and Bogden."¹ *See Exhibit A (comparing FAC ¶ 34 with SAC ¶ 36).*
 5 And, in any event, none of the purportedly fabricated testimony presented to the grand jury was "actively
 6 instrumental in causing the initiation of legal proceedings" against Bundy and Payne, *Awabdy*, 368 F.3d
 7 at 1067, because that testimony was either (1) unrelated to Ryan Bundy and/or Ryan Payne or (2) irrelevant
 8 to the elements of the crimes for which Bundy and Payne were actually indicted. *See Mot.* 16-19.

9 Finally, the Opposition's independent prosecutorial judgment argument incorrectly invokes 28
 10 U.S.C. § 2680(h). Opp. at 8-9. But Section 2680(h) is relevant only to the United States' sovereign
 11 immunity arguments, which are analyzed under Rule 12(b)(1). Mot. at 8; *supra* Part II. That statute
 12 provides no guidance for the Court's Rule 12(b)(6) analysis of whether the SAC alleges affirmative facts
 13 to rebut the presumption of independent prosecutorial judgment. Mot. at 12-13.

14 Here, the SAC includes no affirmative factual allegations that even remotely rebut the presumption
 15 of independent prosecutorial judgment, and the examples invoked in the Opposition are wholly irrelevant
 16 to that analysis. The malicious prosecution claim is subject to dismissal under Rule 12(b)(6) on this basis.

17 **2. The SAC Does Not Allege Facts Suggesting A Legally Cognizable Favorable
 18 Termination Of The Underlying Criminal Proceedings**

19 The Opposition next argues that the Supreme Court's decision in *Thompson v. Clark*, 596 U.S. 36
 20 (2022), removes the favorable termination element from a Nevada state law malicious prosecution claim.
 21 Opp. at 11. Plaintiffs are incorrect; the Supreme Court's holding regarding the elements of a federal
 22 malicious prosecution claim under 42 U.S.C. § 1983 has no bearing on the Nevada state law malicious
 23 prosecution elements at issue in this case.

24 In *Thompson*, the Court held that a plaintiff asserting a federal law Fourth Amendment claim under
 25 Section 1983 for malicious prosecution "need only show that the criminal prosecution ended without a

26
 27 ¹ Plaintiffs' sniper allegations further fail to support a malicious prosecution claim as a matter of
 28 law because the Ninth Circuit already found that representations that the criminal defendants lied about
 feeling surrounded by snipers "do not appear to be elements of the crimes alleged[.]" *United States v.
 Bundy*, 968 F.3d 1019, 1044 (9th Cir. 2020).

1 conviction.” 596 U.S. at 49. But the *Thompson* holding is inapplicable to this FTCA case because, by its
 2 terms, *Thompson* is limited to “a Fourth Amendment claim under 42 U.S.C. § 1983 for malicious
 3 prosecution.” *Id.* at 39. *Thompson* thus does not define the elements of malicious prosecution claims
 4 brought under state law or, correspondingly, to malicious prosecution claims under the FTCA that must
 5 apply substantive state law (Nevada state law, in this instance). *See* 28 U.S.C. § 1346(b) (applying “the
 6 law of the place where the act or omission occurred”); *United States v. Olson*, 546 U.S. 43, 44 (2005).

7 Although the Opposition argues that the cases cited in the Motion (with one notable exception)
 8 “were decided prior to the Supreme Court’s *Thompson* ruling, and thus, have not taken the *Thompson*
 9 ruling into account” (Opp. at 12), state and federal courts from around the country have concluded that
 10 *Thompson*’s federal law holding does not alter the elements of a state-law malicious prosecution claim.
 11 *See, e.g., Neaderbaomer v. United States*, No. 20-cv-07888, 2023 WL 5505906, at *3 (C.D. Cal. Jan. 11,
 12 2023) (noting that the holding in *Thompson* did not apply to a California state law malicious prosecution
 13 claim brought under the FTCA); *Johnson v. United States*, No. 22-cv-00747, 2022 WL 4180455, at *8
 14 n.16 (N.D. Cal. Sept. 12, 2022) (similar); *Maqablh v. Heinz*, No. 16-cv-289, 2023 WL 6392742, at *4
 15 (W.D. Ky. Sept. 29, 2023) (*Thompson*’s holding “had no bearing on the elements of a Kentucky malicious
 16 prosecution claim”); *Littledale v. Sima*, No. 2-22-0177, 2024 WL 3620533, at *13 (Ill. App. Ct. August
 17 1, 2024) (“*Thompson* deals with a Fourth Amendment claim under 42 U.S.C. § 1983 for malicious
 18 prosecution. *Thompson* did not deal with state law claims for malicious prosecution. Therefore,
 19 *Thompson* is inapposite.”) (citation and quotation marks omitted). Moreover, the case cited in the Motion
 20 that post-dates *Thompson*—*Manansingh v. United States*—is directly on point; it arises under Nevada law
 21 and finds that *Thompson* does not control the favorable termination element of a *Nevada state law*
 22 *malicious prosecution claim* in the FTCA context. *See* No. 20-cv-01139, 2024 WL 1638638, at *6 (D.
 23 Nev. Apr. 15, 2024) (“because *Thompson* does not alter the state law requirements for ‘favorable
 24 termination,’ Plaintiffs’ malicious prosecution claim is once again dismissed for failure to state a claim”).²

25 Accordingly, Plaintiffs’ claim that Judge Navarro’s dismissal, standing alone, satisfies the
 26 favorable termination element under Nevada state law is not an accurate statement of the law and cannot
 27

28 ² Plaintiffs’ counsel here was also the plaintiff’s counsel of record in *Manansingh*. *See* *Manansingh v. United States*, No. 20-cv-1139 (D. Nev.) at ECF No. 109.

1 salvage Plaintiffs' Nevada state law malicious prosecution claim. Opp. at 12. Instead, Plaintiffs have the
 2 affirmative obligation to plead facts showing "more than a mere dismissal of the underlying action; he or
 3 she must show facts establishing his or her innocence." *Fetters v. Cty. of Los Angeles*, 243 Cal. App. 4th
 4 825, 843 (2016). The Opposition does not even attempt to argue that the SAC meets this burden.

5 **3. The Malicious Prosecution Claim Should Be Dismissed Because The SAC
 6 Does Not Plead Facts Showing A Lack Of Probable Cause**

7 While Plaintiffs acknowledge that the multiple grand jury indictments of Bundy and Payne
 8 "create[] a rebuttable presumption of probable cause," the Opposition offers the conclusory assertions—
 9 untethered to specific allegations in the SAC—that "[f]alse statements to the grand jury, altered reports
 10 and manipulated video surveillance directly contributed to the indictment." Opp. at 13. The Opposition's
 11 unsupported conclusions do not withstand scrutiny.

12 First, to the extent Plaintiffs argue that law enforcement officials provided "false statements to the
 13 grand jury" (Opp. at 13), the Motion established that the purportedly false testimony that the SAC alleges
 14 was submitted to the grand jury (1) *did not involve* Bundy or Payne and (2) *was unrelated* to the elements
 15 of the crimes for which Bundy and Payne were charged. Mot. at 17-18. Those allegedly false grand jury
 16 statements, therefore, are immaterial to the question currently before the Court: does the SAC allege facts
 17 to rebut the presumption that there was probable cause to initiate criminal proceedings against Bundy and
 18 Payne for the crimes for which the grand jury (repeatedly) indicted them? The Opposition does not point
 19 to *any* factual allegation(s) in the SAC that would allow the Court to answer that question in the positive.

20 Second, the Opposition invokes unspecified "altered reports," but it does not tie that claim to any
 21 allegation in the SAC, much less establish how those reports were altered or even suggest that the altered
 22 reports were presented to the grand jury (and thus could have, even in theory, had an impact on the
 23 indictment). Opp. at 13. Regardless of the lack of clarity in the Opposition, the SAC uses the word
 24 "report" in three paragraphs (SAC ¶¶ 34, 35, & 93(O)), and the only one of those paragraphs that even
 25 arguably matches the conclusory assertion in the Opposition involves Agent Willis's purported testimony
 26 regarding snipers. *Id.* ¶ 35. However, as already found by the Ninth Circuit, statements about snipers "do
 27 not appear to be elements of the crimes alleged[.]" *Bundy*, 968 F.3d at 1044. Accordingly, to the extent
 28 the Opposition's vague assertion about "altered reports" was intended to refer to purported testimony

1 regarding snipers, that testimony cannot rebut the presumption of probable cause because it has nothing
 2 to do with the elements of the crimes with which Bundy and Payne were charged. *Butler v. Smith*, 85
 3 F.4th 1102, 1116 (11th Cir. 2023) (courts “look to the elements of the underlying crime—and in particular,
 4 in a malicious-prosecution case like this one, to the elements of the *charged crime*”) (emphasis in original).

5 Third, the Opposition suggests that “manipulated video surveillance directly contributed to the
 6 indictment,” but the Opposition once again does not link that claim to any factual allegation in the SAC.
 7 Opp. at 13. To the extent the Opposition’s unsupported statement was intended to refer to surveillance
 8 camera footage of the Bundy Ranch, there is no factual allegation *anywhere* in the SAC suggesting that
 9 such surveillance camera footage was displayed to, relied upon, or even at issue when the grand jury
 10 repeatedly indicted Bundy and Payne. Instead, the SAC alleges that the surveillance camera footage was
 11 not at issue in the criminal proceedings until August 2017, more than a year *after* federal prosecutors
 12 obtained the superseding indictment for Bundy and Payne. SAC ¶ 34; *supra* Part III.A.1. And, once
 13 again, neither the SAC nor the Opposition establishes how “manipulated video surveillance” was relevant
 14 to the elements of the claims for which Bundy and Payne were indicted, even assuming (in the absence of
 15 any supporting allegation in the SAC) that such evidence had been presented to the grand jury.

16 Fourth, the Opposition makes conclusory assertions about “stag[ed] confrontations” and
 17 “suppress[ed] exculpatory evidence” (Opp. at 13), but there are no facts—either in the SAC or the
 18 Opposition—that link this conduct to either (1) evidence presented, or not, to the grand jury (as opposed
 19 to post-indictment proceedings) or (2) the elements of Ryan Bundy’s and Ryan Payne’s charged crimes.

20 Fifth, the Opposition invokes Judge Navarro’s dismissal order, but that order, as described in the
 21 SAC, was based on the government’s *post-indictment* “failure to produce *Brady* materials” (SAC ¶ 95),
 22 and neither the SAC nor the Opposition identifies anything from that order suggesting that the underlying
 23 indictments were devoid of probable cause. Opp. at 14; SAC ¶¶ 94-95; *Smiddy*, 665 F.2d at 266.

24 Finally, the Opposition does not address the other probable cause argument in the Motion, namely
 25 that, even assuming the grand jury was presented with fabricated evidence related to Ryan Bundy and
 26 Ryan Payne and that the fabricated evidence was relevant to the elements of the crimes for which Ryan
 27 Bundy and Ryan Payne were charged (and, to be clear, there are *no* such factual allegations in the SAC),
 28 the prosecutions were still supported by *independent* probable cause. Mot. at 18-19. In fact, the

1 indictments contain lengthy recitations of Ryan Bundy's and Ryan Payne's criminal wrongdoing that are
 2 independent of any purportedly false evidence presented to the grand jury (Underlying Action at ECF
 3 Nos. 5 & 27), and the SAC does not allege facts to suggest that Bundy's and Payne's criminal indictments
 4 were not supported by probable cause for those other events. By failing to respond to the independent
 5 probable cause argument in the Motion, Plaintiffs concede that issue. *See Moore v. Ditech Fin., LLC*, No.
 6 16-cv-1602-APG-GWF, 2017 WL 2464437, at *2 (D. Nev. June 7, 2017); *see also Sasiada v. Switch,*
 7 *Ltd.*, No. 23-CV-88 JCM (NJK), 2024 WL 454994, at *2 n.1 (D. Nev. Feb. 5, 2024) ("Any arguments to
 8 which no response is supplied may be deemed conceded as unopposed."); Civil Local Rule 7-2(d).

9 **B. The IIED Claim Is Barred By Sovereign Immunity, Deficiently Pleaded, And—As
 10 Reimagined In The Opposition—Time Barred**

11 Plaintiffs spend most of their discussion of the IIED claim arguing that 28 U.S.C. § 2680(h) does
 12 not bar that cause of action because the SAC deleted all allegations of federal prosecutorial direction,
 13 guidance, and control. Opp. at 15. But, as discussed above, Plaintiffs cannot create subject matter
 14 jurisdiction solely by deleting 47 paragraphs of allegations in the FAC regarding federal prosecutorial
 15 control, all of which negate federal subject matter jurisdiction in this case. Mot. at 9-11; *supra* Part II.

16 The Opposition also makes the separate Rule 12(b)(6) argument that the SAC "includes specific
 17 actions that were 'extreme and outrageous'" and that the SAC "describes in disturbing detail how federal
 18 agents harassed family members, maintained 'kill books,' deployed sniper teams, and staged false flag
 19 interactions under the guise of 'Longbow Productions.'" Opp. at 15. There are three problems here.

20 **1. The IIED Claim, As Alleged In The SAC, Is Barred By Section 2680(h)**

21 The IIED claim in the SAC is not premised on the purportedly "extreme and outrageous" pre-
 22 indictment events recounted in the Opposition. Instead, the IIED claim in the SAC is grounded in *the*
 23 *prosecution* of Ryan Bundy and Ryan Payne and the claimed emotional toll the resulting pretrial detention
 24 imposed on Plaintiffs. *See* SAC ¶¶ 97-108 (describing Plaintiffs' claimed emotional distress damages, *all*
 25 of which stem from the absence of Bundy and Payne during pretrial detention). The emotional distress
 26 damages alleged in the SAC thus all arise out of Bundy and Payne's prosecution, and, accordingly, are
 27 barred by 28 U.S.C. § 2680(h). *See Snow-Erlin v. United States*, 470 F.3d 804, 808 (9th Cir. 2006) (courts
 28 must "look[] beyond the labels used to determine whether a proposed claim is barred [under § 2680(h)]")

1 and if “the gravamen of Plaintiff’s complaint is a claim for an excluded tort under § 2680(h), then the
 2 claim is barred”); *see also Sheehan v. United States*, 896 F.2d 1168, 1172 (9th Cir. 1990) (barring an IIED
 3 claim under § 2680(h) if “in substance the conduct relied upon constituted a specifically excluded tort”).

4 **2. The IIED Claim Alleged In The SAC Also Fails To State A Claim Upon
 5 Which Relief Can Be Granted Because Bundy And Payne’s Prosecutions
 Were Supported By Probable Cause**

6 Even if the IIED claim—as alleged in the SAC—is not barred by Section 2680(h), it still fails to
 7 state a claim upon which relief can be granted because criminal prosecution does not qualify as “extreme
 8 and outrageous” where the prosecution is supported by probable cause. *Bouari v. United States*, No. 21-
 9 cv-226-JCM-VCF, 2021 WL 4699233, at *5 (D. Nev. Oct. 7, 2021), *aff’d Bouari v. United States*, No.
 10 21-16762, 2023 WL 1794241, at *3 (9th Cir. Feb. 7, 2023); *Brown v. Lever*, No. 17-cv-00828-JAD-PAL,
 11 2018 WL 1903120, at *8 (D. Nev. Apr. 20, 2018). As discussed above, there are no facts alleged in the
 12 SAC that come close to rebutting the presumption that Ryan Bundy’s and Ryan Payne’s prosecution was
 13 supported by probable cause. Mot. at 16-19 (discussing probable cause); *supra* Part III.A.3 (same).

14 **3. The Reimagined IIED Claim Discussed In The Opposition Is “Forever
 15 Barred” By The FTCA’s Two-Year Statute Of Limitations**

16 Finally, the Opposition seeks to refocus the IIED claim on events that occurred *prior* to Bundy’s
 17 and Payne’s indictment, but the IIED claim in the SAC addresses Ryan Bundy’s and Ryan Payne’s *post-*
 18 *indictment* prosecution (*see supra* Part III.B.1; SAC ¶¶ 97-108), and Plaintiffs cannot amend their SAC
 19 through an opposition brief. *See Ademiluyi v. Phillips*, No. 14-cv-00507-MMD-CWH, 2014 WL 7012493,
 20 at *3 (D. Nev. Dec. 12, 2014) (“Statements made in an opposition brief cannot amend the complaint”).

21 But even if Plaintiffs were permitted to amend their IIED claim through the Opposition, that effort
 22 would fail from the outset because any such IIED claim would be barred by the FTCA’s statute of
 23 limitations. Under the FTCA, a tort claim against the United States is “forever barred unless it is presented
 24 in writing to the appropriate Federal agency within two years after such claim accrues[.]” 28 U.S.C.
 25 § 2401(b). “The date on which an FTCA claim accrues is determined by federal law.” *Bartleson v. United*
 26 *States*, 96 F.3d 1270, 1276 (9th Cir. 1996). An FTCA claim accrues when the plaintiff has a complete
 27 cause of action and “knows or has reason to know of the injury which is the basis of his action.” *Hensley*
 28 *v. United States*, 531 F.3d 1052, 1056 (9th Cir. 2008); *Gallardo v. United States*, 755 F.3d 860, 864 (9th

1 Cir. 2014); *Nhia Kao Vang v. Decker*, No. 12-cv-01226, 2012 WL 5020491, at *9 (E.D. Cal. Oct. 17,
 2 2012) (under the FTCA, a “cause of action for intentional infliction of emotional distress accrues, and the
 3 two-year statute of limitations begins to run, when the plaintiff suffers the severe emotional distress”).

4 Here, the SAC alleges that Plaintiffs submitted an administrative “Claim for Damage, Injury or
 5 Death . . . on or about February 3, 2020.” SAC ¶ 110. Accepting that allegation as true, any IIED claim
 6 that accrued prior to February 3, 2018 is “forever barred.” 28 U.S.C. § 2401(b). The new, *pre*-indictment
 7 events that the Opposition claims underlie the IIED cause of action all predate February 3, 2018. For
 8 example, the “kill books” and “sniper team” allegations occurred during the 2014 cattle impoundment
 9 operation. *See* SAC ¶ 23. Similarly, the Longbow Productions allegations predate Bundy and Payne’s
 10 February 17, 2016 indictment (which itself was almost two years before the February 3, 2018 limitations
 11 date).³ *Id.* ¶¶ 53-56.

12 **C. The Derivative Loss Of Consortium Claim Should Be Dismissed Because Plaintiffs
 13 Do Not Allege Any Other Valid Claims**

14 As established above, Plaintiffs’ malicious prosecution and IIED claims are subject to dismissal.
 15 Plaintiffs thus cannot maintain the derivative loss of consortium claim either.

16 **IV. The United States’ Motion To Dismiss The Constitutional And Statutory Violation
 17 Allegations Should Be Granted As Unopposed**

18 Just like the last round of motion to dismiss proceedings, the Opposition currently before the Court
 19 fails to respond to the Motion’s dismissal arguments regarding the constitutional and statutory violation
 20 allegations. Plaintiffs thus concede those issues, and those allegations should be dismissed. *Sasiada*,
 21 2024 WL 454994, at *2 n.1; Civil Local Rule 7-2(d).

22 **V. Conclusion**

23 The United States respectfully asks the Court to grant the Motion, with prejudice.

24

25 ³ The Opposition’s reference to harassment of family members is unclear (Opp. at 15), but to the
 26 extent that conclusion relates to “post arrest jail phone” monitoring (*see* SAC ¶ 28) the SAC does not
 27 allege when Plaintiffs became aware of that purported conduct and suffered resulting emotional distress
 28 and, in any event, any such conduct would (1) arise out of Bundy’s and Payne’s prosecution and thus be
 barred by Section 2680(h) (*supra* Part III.B.1) or (2) fail to plead facts establishing that the government’s
 efforts to monitor the post-arrest jail calls of individuals who were indicted (repeatedly) by a grand jury
 based on (repeated) findings of probable cause were either “extreme” or “outrageous” (*supra* Part III.B.2).

1 DATED: July 18, 2025

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7 Acting Under Authority Conferred
8 by 28 U.S.C. § 515

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